IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 23368 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? NO

2 To be referred to the Reporter or not ? NO

3 Whether their Lordships wish to see the fair copy of the judgment ? NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO

5 Whether it is to be circulated to the civil judge ? NO

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DURGABEN SUDHIRKUMAR GAJJAR WD/O SUDHIRKUMAR N GAJJAR - Petitioner(s)

Versus

BINODA @ KATHA SUDHIR GAJJAR & 8 - Respondent(s)

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Appearance :

MR YH VYAS for Petitioner(s) : 1,
MS LILU K BHAYA for Respondent(s) : 1 - 2.
None for Respondent(s) : 3 - 9.

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 19/12/2006

ORAL JUDGMENT

1. Smt. Durgaben Sudhirkumar Gajjar, petitioner, has filed this petition under Article 227

of the Constitution of India with a prayer that this Court may quash and set aside the order dated 21.4.2006 passed by the learned 6th Additional Senior Civil Judge, Mehsana, below Exh. 145 in Special Civil Suit No. 305 of 2002 by holding and declaring that the same is bad, illegal, contrary to and inconsistent with law and contrary to the provisions of the Code of Civil Procedure. The petitioner has further prayed that this Court may allow the reliefs as claimed in application Exh. 145 of the petition preferred before the learned Civil Judge (S.D.), in Special Civil Suit No. 305 of 2002.

1.1 This petition was filed on 24.7.2006. Mr. Yogesh H. Vyas, learned advocate, appears on behalf of the petitioner. I have heard him on 8.12.2006, 15.12.2006 and also today i.e. 19.12.2006. I have heard Ms. Lilu Bhaya, learned advocate for respondent Nos. 1 and 2. She has pointed out certain facts. With consent of the parties I have taken up the matter for final disposal.

2. The learned counsel for the petitioner

states that this matter pertains to application filed by Smt. Durgaben Sudhirkumar Gajjar being application Exh. 145 in pending Suit being Special Civil Suit No. 305 of 2002 before the learned Civil Judge and the order passed on 21.4.2006. There are also proceedings in Special Civil Suit No. 305 of 2002 filed by Smt. Binoda @ Katha Sudhir Gajjar filed before the learned Civil Judge (S.D.), Mehsana and the written statement filed by original defendant Nos. 1 and 2 application Exh. 34 and also order dated 13.4.2004 passed by the third Joint Civil Judge (Senior Division) in Special Civil Suit No. 305 of 2002 – order below Exh. 34. i.e. Order I Rule 10(2) regarding joining the plaintiff No. 3 and further proceedings. Copies of the reply filed on 24.2.2006.

3. The background of the matter is as under:

3.1 Respondent No. 1 Binoda @ Katha Sudhir Gajjar got married with Shri Sudhir Narandas Gajjar (now deceased) son of original defendant No. 1 i.e. Sakarben Narandas Gajjar (respondent No. 3) and brother of original defendant No. 2 i.e. Hasmukhbhai

Narandas Gajjar (respondent No. 4).

3.2 It is the case of the respondent that in January, 1979 the original plaintiff No. 1 (respondent No. 1) handed over the streedhan and all valuable articles to original defendant No. 1 Sakarben Narandas Gajjar, her mother-in-law at Mumbai which was in her custody till the death of Shri Sudhir Narandas Gajjar.

3.2A Out of the wedlock of plaintiff No. 1 with Sudhir Narandas Gajjar a baby girl Stuti alias Pinki was born in 1981 who is respondent No. 2 herein.

3.3 Afterwards, dispute and difference arose between plaintiff and deceased Sudhir Narandas Gajjar and in 1985-86 plaintiff No. 1 with her daughter shifted to Ahmedabad with mutual consent because of disturbances in their married life and started practising before this Court.

3.4 Since plaintiff No. 1 was herein at Ahmedabad original defendant No. 2 (respondent No. 4)

attempted to sell the immovable property viz. Bungalow in the name of the husband of the original plaintiff No. 1 and original plaintiff No. 1 and her daughter original plaintiff No. 2 (respondent No. 2) had right in the aforesaid property.

3.5 The deceased Sudhir Narandas Gajjar was having Government job at the relevant time. However, he had confirmed that he and respondent No. 1 were staying separately because of their differences and disputes but he had assured respondent No. 1 that he would take sufficient care to protect the interest of his daughter Stuti respondent No. 2 herein and respondent No. 1.

3.6 The husband of respondent No. 1 Sudhir Narandas Gajjar died 25.10.2002 at Mumbai.

3.7 Original defendant No. 2 i.e. respondent No. 4 herein reached India on 26.10.2002 who was staying abroad and tried to take away all the movable and immovable properties of deceased Sudhir Narandas Gajjar, husband of original plaintiff No. 1 and

father of original plaintiff No. 2.

3.8 Respondent No. 1 was not informed about the death of her husband Sudhir Narandas Gajjar. However, with the help of some friends and relatives and neighbours she was informed about the death of her husband.

3.9 Respondent No. 1 went to her in-law's house on 1.11.2002 at Kadi for “Besana” but they did not allow her to enter the house and gave ill-treatment and did not allow her to know about streedhan and movable and immovable properties of deceased Sudhir Narandas Gajjar. It is the case of plaintiff No. 1 that mother of deceased Sudhir Narandas Gajjar i.e. Sakarben Narandas Gajjar, respondent No. 3 herein and brother of the deceased Sudhir Narandas Gajjar, respondent No. 4 herein, had also tried to take away the pensionary dues of the deceased for which original plaintiff No. 1 was entitled to get the benefits.

3.10 In view of this, the original plaintiff

No. 1 filed Suit on 7.11.2002 before the learned Civil Judge (J.D.), Kadi, being Civil Suit No. 154 of 2002 which was limited only to bank locker for restraining operation of the bank locker. Injunction was granted in favour of the original plaintiff No. 1 on 12.11.2002.

3.11 Original defendant Nos. 1 and 2 had tried to open the bank locker and took away all the articles, ornaments, fixed deposit receipts, securities and nothing remained for the widow and her daughter i.e. original plaintiff Nos. 1 and 2.

3.12 The original defendant No. 2 had left India on 12.11.2002 after managing to get the entire movable properties of the deceased Sudhir Narandas Gajjar so that nothing is left for original plaintiff Nos. 1 and 2 except immovable properties.

3.13 The original defendant Nos. 1 and 2 filed reply dated 13.11.2002 in Civil Suit No. 154 of 2002 confirming that original plaintiff No. 1 is the wife and original plaintiff No. 2 is the daughter in their

affidavit in reply.

3.14 In view of the same, original plaintiff No. 1 filed Special Civil Suit No. 305 of 2002 before the Civil Cort, Mehsana for all the properties in which injunction was granted on 30.12.2002.

3.15 The present petitioner as a third party has filed application Exh. 34 claiming herself to be wife of the deceased Sudhir Narandas Gajjar on 30.3.2003 and stated that she is a necessary party and proper party. The third party also produced list of documents vide Exh. 36 wherein nowhere marriage certificate, registration certificate or any other legal documents to prove that she is the legally wedded wife of deceased Sudhir Narandas Gajjar were produced.

3.16 Original Plaintiff No. 1 filed reply to Application Exh. 34 on 30.4.2003.

3.17 The learned Civil Judge (S.D.) after hearing the parties was pleased to reject the application of

the third party to join as necessary party by order dated 13.4.2004. The learned Judge has given cogent and convincing reasons in rejecting the application.

3.18 Meanwhile , original defendant No. 1, mother of husband expired on 4.3.2005 leaving no property in her name.

3.19 The petitioner thereafter filed another application Exh. 145 on 4.2.2006 and again approached the Civil Court with a prayer that she may be joined as party in the Suit as she is necessary and proper party. The respondent filed reply on 24.2.2006 to Application Exh. 145 objecting that the third party has no legal right or interest to claim in the properties of the deceased Sudhir Narandas Gajjar.

3.20 The learned trial Judge after hearing the parties was pleased to reject the said application Exh. 145 by his order dated 21.4.2006. The learned Judge has given clear and logical reasons in this behalf.

3.21 Being aggrieved and dissatisfied with the aforesaid order of the Court below, the petitioner filed this petition under Article 227 of the Constitution of India with a prayer that this Court may quash and set aside the order dated 21.4.2006 passed by the learned 6th Additional Senior Civil Judge, Mehsana, below Exh. 145 in Special Civil Suit No. 305 of 2002 by holding and declaring that the same is bad, illegal, contrary to the provisions of the Code of Civil Procedure. The petitioner further prayed that this Court may be pleased to allow the reliefs as claimed in Application Exh. 145 of the petitioner preferred before the learned Civil Judge (S.D.) in Special Civil Suit No. 305 of 2002.

3.22 The petition was filed on 24.7.2006. When this matter was placed for hearing this Court passed order on 8.12.2006. Thereafter, the matter was heard at length. Mr. Y.H. Vyas, learned advocate, appears on behalf of the petitioner. He has tried to assail the order of the Court below. On the other hand Ms. Lilu Bhaya, learned advocate, appears on behalf of the respondent Nos. 1 and 2 only. She has tried to

support the order passed by the Court below.

3.23 I have considered the facts of the case. I have to first consider the order passed by the learned Civil Judge (S.D.) on 13.4.2004 below Exh. 34 in Special Civil Suit No. 305 of 2002. In the said order the learned Judge was pleased to reject the said application stating that the petitioner is not a proper and necessary party on the ground that she was not able to prove by way of any evidence that she has been legally wedded wife of deceased Sudhirkumar Narandas Gajjar. Once she failed miserably to produce the said evidence, in the Suit filed by the first legally wedded wife for the relief claimed therein, she is neither necessary party nor a property party. The Suit has been filed by the legally wedded wife and her daughter. The learned trial Judge has given very cogent and convincing reasons.

3.23a However, thereafter, it appears that another application has been filed being Exh. 145 again by Durgaben Sudhirkumar Gajjar under Order 22 Rule 4 of the Code of Civil Procedure to be joined as

necessary and property on the ground that she is the legal representative of deceased Sakarben @ Sakariben Narandas Gajjar. In the said application it is stated that deceased Sakarben expired on 4.3.2005. The deceased had executed a Will on 9.1.2003 in which she has been given property by inheritance and she has not kept property and thus she is a legal representative of deceased Sakarben Narandas Gajjar. Therefore, she is a necessary and proper party on the ground that she is the legal representative of deceased Sakarben Narandas Gajjar and she may be joined as necessary party. Even to join heirs of deceased an application was filed on 30.4.2005 which was exhibited at Exh. 139. In view of this changed circumstances she may be joined as a party in the aforesaid Suit as legal representative of deceased Sakarben Narandas Gajjar. As there was a delay of 240 days, it was also prayed that the delay may be condoned.

3.24 Defendant Nos. 1 and 2 have filed Exh. 152 reply and stated that the said application be rejected on the ground that earlier this Court has

already rejected the said application by order dated 13.4.2004. In view of Order 2 Rule 2 the present application is also to be rejected.

3.25 The learned 6th Additional Senior Civil Judge, Mehsana by his judgement and order dated 21.4.2006 was pleased to reject the said application.

3.26 Mr. Vyas, learned advocate for the petitioner has made elaborate submission challenging the said order on various grounds. Ms. Lilu Bhaya, learned advocate for the respondents Nos. 1 and 2 has tried to support of the order of the learned trial Judge. The learned trial Judge has compared the original Will Exh. 147/1 which was kept on the safe custody of Nazir with the Will produced by the applicant. From the Will, the learned Judge has come to the conclusion that it is not clear as to which property has been given to the applicant by Will. Secondly even if the contention of the applicant that she was taking care of deceased Sakriben is accepted then why there was delay and why she has filed the application after 240 days. There, the applicant has

not given any reasons. She was aware about the earlier application Exh. 34 and the order was passed by the Court in this behalf. So the applicant was aware about the earlier proceedings. The learned Judge has also held that the applicant has not come with clean hands. The learned Judge has also held that as per Indian Succession Act, Sections 66, 88 and 89 the Will is not as per the said provisions and therefore the learned Judge has felt that there are several doubts created in connection with the production of the Will. The learned Judge has further held that prima facie the applicant has no right in the property in dispute as she has no legal right through deceased Sudhirkumar Narandas Gajjar and therefore once she has no right she will not have the right against the property of Sakarben Narandas Gajjar. In view of the same under Order 22 Rule 4 the applicant cannot be called a legal representative.

3.27 The learned Judge has also not accepted the contention regarding condonation of delay. The learned Judge further held that the Will exhibited at mark 147/1 created some doubt and the applicant has

not provided all documents to the other side also and the applicant has not come with clean hands and therefore tried to obtain Will of the deceased and therefore the application has been rejected.

4. Mr. Vyas, learned advocate for the petitioner, has tried to assail the order of the learned trial Judge on several grounds. In assailing the judgement, he has relied on the judgement of the Hon'ble Supreme Court in the case of ANDHRA BANK LTD. VS. R. SRINIVASAN & OTHERS reported in AIR 1962 SC 232 and another judgement in the case of CHIRANJILAL SHRILAL GOENKA VS. JASJIT SINGH AND OTHERS reported in (1993) 2 SCC 507.

5. It is no doubt true that the petitioner has not challenged the earlier order dated 13.4.2004. I have referred to the earlier order dated 13.4.2004. I find cogent and convincing reasons given by the learned Judge in the said order whereby the learned Judge has rejected the application for joining the applicant as a party in the proceedings on the ground that she is neither necessary nor a property party

because she failed to produce any evidence to show that she is a legally wedded wife of Sudhirkumar Narandas Gajjar.

6. As regards application Exh. 145, the applicant has filed the same on the ground that she happens to be legal representative of deceased Sakarben Narandas Gajjar. The learned trial Judge has given cogent and convincing reasons for rejecting the same. I have considered the order of the learned trial Judge. In my view, the reasons given by the learned trial Judge are legal and proper. The learned advocate for the petitioner has not been able to show anything that the learned trial Judge has committed any error of jurisdiction or even error of law. Under Article 227 of the Constitution of India this Court has a very limited jurisdiction. I, therefore, do not intend to interfere with the said order of the learned trial Judge. Whatever reasoning applied for rejecting the first application Exh. 34 by order dated 13.4.2004, the same partly applies to the second application because the fact remains that the applicant is not legally wedded wife of Sudhirkumar

Narandas Gajjar. She is claiming the right on the basis of the Will of Sakarben Narandas Gajjar who happens to be mother of deceased Sudhirkumar Narandas Gajjar. She has claimed her right on the ground that the deceased Sakarben Narandas Gajjar executed a Will on 9.1.2003 and all the properties have been bequeathed to her.

7. I have considered the facts and circumstances of the case. I have also considered Section 66 of the Indian Succession Act which provides the mode of making, and rules for executing, privileged Wills. Section 88 of the said Act provides the last of two inconsistent clauses prevails. Section 89 of the said Act provides Will or bequest void for uncertainty.

INCONSISTENT BEQUESTS:

> The second portion deals with inconsistent bequests. Where the object of a testator's bounty or the subject of disposition is described in items which are applicable

indifferently to more than one person or thing, evidence is admissible to prove which of the person or thing so described was intended by the testator. But if notwithstanding such attempts, the language of the Will is so equivocal or obscure as to leave the testator's intention difficult to ascertain, the bequest will be void for uncertainty. That is the second part of the section, where it is stated that a bequest, not expressive of any definite intention, is void for uncertainty.

The word “definite” used in the Section requires that to the validity of every disposition there should be a definite subject, and a definite object, and uncertainty in either of these particulars is fatal.

(Re: Indian Succession Act, 1925, 9th Edition, by S.S. Subramani & K.Kannan S. 89, page 348)

8. In this matter the learned Judge has held that the execution of will is doubtful in view of the Indian Succession Act. Secondly the will does not give any right in favour of original applicant as per Succession Act and the applicant is also not legal representative and therefore also the applicant is not entitled in this behalf. There is also uncertainty of bequest also. Uncertainty in regard to the objects of a bequest arises either from the testator having described such objects in vague terms. Even if there is an object of bequest is not certain but if the members of the class to whom bequest has been given the same class should be certain. If there is uncertainty then also the bequest becomes void.

8A. In view of these provisions, the reasoning given by the learned trial Judge are right as he has stated that there is a doubt created in the Will produced by the applicant because the learned trial Judge has compared the original Will which was to be in the custody of Nazir of the Court and xerox copy of the Will which has been produced by the applicant.

9. As regards the first decision in the case of ANDHRA BANK LTD. VS. R. SRINIVASAN AND OTHERS (Supra) it provides that legal representative is a `person who in law represents the estate of a deceased person'. Estate does not mean the whole of the estate. Even a legatee who obtains only a part of the estate of the deceased under a Will can be said to represent his estate and is therefore legal representative under Section 2(11).

10. Similarly, the other judgement in the case of CHIRANJILAL SHRILAL GOENKA VS. JASJIT SINGH (supra) legal representatives includes executor of a Will of deceased testator.

11. When the said Will which has been produced by the applicant is doubted by the learned trial Judge then naturally the petitioner cannot get any right whatsoever in this behalf. The learned Judge has stated that in the Will the age of the deceased Sakarben Narandas Gajjar has been wrongly stated, the Will does not say that which of the properties was

given to the petitioner, she is also not legal representative as contemplated under Order 22 Rule 4 of the Code of Civil Procedure. I have considered the fact that once genuineness of the Will is doubted, the applicant is not entitled to any relief. I have also considered the provisions of the Indian Succession Act. The applicant has tried to obtain the order mala fide. This conduct shows that the applicant has not come with clean hands. In view of this, the learned trial Judge has rightly rejected the application of the petitioner. I, therefore, do not see any reason to interfere with the order of the learned trial Judge.

12. The decisions cited by the learned advocate for the petitioner also do not assist the case of the petitioner because here the genuineness of the Will has been doubted.

13. In any view of the matter, in this matter the trial court passed the order and there is no jurisdictional error and no error of law in view of the judgment of the Hon'ble Supreme Court in the case

of Surya Dev Rai vs. Ram Chander and others reported in 2003(6) SCC 675, this Court do not intend to exercise the jurisdiction under Article 227 of the Constitution of India.

14. In the result, the petition is rejected with no order as to costs.

(K.M. MEHTA, J)

(pkn)